

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re: Case No. 16-24179
GREEN BOX NA GREEN BAY, LLC Chapter 11
Debtor.

MOTIONS OF ABILITY INSURANCE COMPANY TO (A) PROHIBIT USE OF CASH
COLLATERAL, AND (B) GRANT RELIEF FROM STAY OR, IN THE ALTERNATIVE TO
(C) PROVIDE ADEQUATE PROTECTION AND (D) DECLARE DEBTOR A SINGLE
ASSET REAL ESTATE ENTITY

Ability Insurance Company (“Ability”) moves the court to prohibit Green Box NA Green Bay, LLC, the debtor in possession (“Debtor”), from using cash collateral and to provide other relief as requested below. In support of these Motions, Ability states as follows:

JURISDICTION

1. This court has jurisdiction of this matter under 28 U.S.C. § 1334.
2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (M).

ALLEGATIONS COMMON TO ALL MOTIONS

3. Debtor was the subject of an involuntary Chapter 128 Receivership Action, identified as Brown County Case No. 15-CV-764, filed May 20, 2015. The Brown County Circuit Court entered the Order Appointing Receiver on June 2, 2015. (McKinnon Aff., Exh. A)
4. Debtor’s lack of cooperation throughout the course of the Receivership Action was palpable:

a. Debtor failed to produce records or a list of assets to the Receiver, resulting in a Motion to Compel filed by the Receiver on June 24, 2015. The Brown County Circuit Court held a hearing on July 20, 2015, and ordered Debtor to produce certain documents, including a correct inventory of all its assets. (McKinnon Aff., Exh. B).

b. Debtor failed to produce an accurate inventory, failed to disclose creditors, and failed to turn over rent proceeds received from a subtenant, resulting in a Motion for Contempt and Sanctions filed by the Receiver on November 2, 2015. (McKinnon Aff., Exh. C). Soon thereafter, Clifton Equities, Inc. (a creditor in the Receivership Action) also filed a motion seeking to hold the Debtor in contempt for removing collateral from the State of Wisconsin without authority of the Receiver. (McKinnon Aff., Exh. D). The Brown County Circuit Court held a hearing on February 22, 2016, and then issued two Orders of Contempt on March 22, 2016. (McKinnon Aff., Exhs. E and F).

c. After Debtor failed to purge its contempt, the Brown County Circuit Court issued a Writ of Bodily Attachment on April 20, 2016 directing the Brown County Sheriff to arrest Debtor's principal member, Ronald H. Van Den Heuvel. (McKinnon Aff., Exh. G).

5. In an effort to discover the assets of the Debtor, the Chapter 128 Receiver designated Attorney Brittany Ogden to conduct a deposition of Debtor's member, Ronald Vanden Heuvel, on February 15 and February 17, 2016. When asked even basic questions concerning the assets and income of the Debtor, Mr. Vanden Heuvel answered, "*On counsel's advice I invoke my right under the Fifth Amendment not to answer on the grounds I may incriminate myself.*" Those basic questions involved the following topics:

- i. The location of Debtor's computers (McKinnon Aff., Exh. H 126:15-127:4);
- ii. The location of Debtor's records not in possession of the Brown County Sheriff's Office (McKinnon Aff., Exh. H 154:18-155:7);
- iii. The Debtor's ability to access its records from cloud storage (McKinnon Aff., Exh. H 156:1-156:5);
- iv. The Debtor's source(s) of income (McKinnon Aff., Exh. H 156:10-15);

- v. The Debtor's unauthorized transfer of specific assets (McKinnon Aff., Exh. H 129:6-18);
- vi. The Debtor's transfer of other assets within the prior three years (McKinnon Aff., Exh. H 160:6-10);
- vii. The identity of other officers, directors, members, agents or individuals that would have knowledge regarding the assets and liability of the Debtor (McKinnon Aff., Exh. H 174:7-13);
- viii. The Debtor's payment to individuals, owners, officers, directors or members (McKinnon Aff., Exh. H 160:11-13);
- ix. The Debtor's failure to provide ledgers and other accounting records to the Receiver (McKinnon Aff., Exh. H 142:9-143:13);
- x. The Debtor's failure to provide the identity of the IT personnel utilized by Debtor (McKinnon Aff., Exh. H 144:14-19);
- xi. The Debtor's failure to provide other supporting documents to the Receiver (McKinnon Aff., Exh. H 145:6-13).

6. Debtor commenced this case by filing a voluntary petition for relief under Chapter 11 of Bankruptcy Code on April 27, 2016 (the "Petition Date") – just seven days after the Court issued the Writ of Body Attachment identified in paragraph 3(c), above. The Petition was signed by Ronald Van Den Heuvel who, by the Petition Date, had also been federally indicated for a series of criminal charges based on an alleged scheme to fraudulently obtain loans from a local bank for Van Den Heuvel's various companies. (McKinnon Aff., Exh. I).

7. The Debtor owes a fully matured note to Ability that is due and owing in the amount of \$9,681,100.00.00 as of the Petition Date, inclusive of interest, late fees and advances through the Petition Date. (McKinnon Aff., Exh. J).

8. Payment of Ability's Claim is secured by a nonavoidable, first-priority Mortgage and Security Agreement in real estate owned by Debtor located at 2107 American Boulevard, De

Pere, WI 54115 (the “Real Estate”), which was recorded with the Brown County Register of Deeds on December 13, 2013 as Document No. 2654008. (McKinnon Aff., Exh K).

9. Payment of Ability’s Claim is further secured by a nonavoidable, Absolute Assignment of Leases and Rents in the Real Estate, which was recorded with the Brown County Register of Deeds on December 13, 2013 as Document No. 2654009. (McKinnon Aff., Exh L).

10. The Debtor has made no payment to Ability since July of 2014, and has failed to pay its real estate taxes for the past 3 years.

11. Upon information and belief, Debtor is leasing the entirety of the Real Estate to an entity called Patriot Tissue, LLC (which, upon information and belief, shares common ownership with Debtor).

12. Upon further information and belief, Debtor does not use the Real Estate for any income producing business activities and, in fact, Patriot Tissue has not paid the Debtor any rents since the commencement of the Receivership Action. (McKinnon Aff. Exh. M).

13. All presently existing and hereafter acquired revenue from the Real Estate secures Ability’s Claim pursuant to the loan agreements between the parties and Section 552(b) of Bankruptcy Code, and constitute cash collateral within the meaning of Section 363 of Bankruptcy Code (collectively, the “Cash Collateral”).

MOTIONS

A. MOTION TO PROHIBIT USE OF CASH COLLATERAL

14. Ability does not consent to the Debtor’s use of the Cash Collateral, and the Debtor has not obtained court authorization to use Cash Collateral as required by Section 363(c)(2) of the Bankruptcy Code. Nor is Ability aware of whether the Debtor is segregating and

accounting for the Cash Collateral as required by Section 363(c)(4) of Bankruptcy Code.

15. The Debtor has offered Ability adequate protection payment for the Debtor's use of the Cash Collateral, however, despite numerous requests by Ability, has not offered Ability any evidence of the Debtor's *actual* sources of income that would enable the Debtor to make any such payment. Given the unique facts of this case, and the Debtor's past inability to provide evidence regarding its sources of income, the Debtor's mere promise of payment is insufficient assurance that adequate protection can or will be made by the Debtor.

16. Debtor's use of the Cash Collateral will immediately and irreparably harm Ability's interest in the Cash Collateral. Ability is therefore entitled to immediate relief.

B. MOTION FOR RELIEF FROM STAY

17. Cause exists for relief from the automatic stay pursuant to Section 362(d)(1) of Bankruptcy Code. Specifically, Debtor's lack of good faith in the filing of this bankruptcy petition constitutes "cause" for relief from the automatic stay within the meaning of 11 U.S.C. § 362(d)(1). *In re Laguna Associates L.P.*, 30 F.3d 734, 737 (6th Cir.1994); *Carolin Corp. v. Miller*, 886 F.2d 693, 699 (4th Cir.1989); *In re Little Creek Development Co.*, 779 F.2d 1068, 1071-72 (5th Cir.1986); *In re Dixie Broadcasting, Inc.*, 871 F.2d 1023 (11th Cir.1989).

18. Factors to consider in determining if Debtor filed this Chapter 11 petition in bad faith include: (a) the lack of reasonable probability of an effective reorganization; (b) the Debtor has only one asset; (c) the Debtor has a limited number of employees or no employees; (d) the inability of the Debtor to meet current expenses; (e) the Debtor has relatively few unsecured claims; (f) the assets of the Debtor are subject to pending foreclosure action as result of arrearage on indebtedness; (g) timing of the Debtor's filing evidences attempt to delay or frustrate

legitimate efforts of secured creditors to enforce their rights under state law; and (h) the Debtor's financial problems involve largely dispute between debtor and secured creditor which can be resolved in pending state court action. In re The Ophir Trust, 112 B.K. 956 (E.D. Wis.).

19. This Court need not find *each* element present to determine a lack of good faith.

Most of these “badges of bad faith” are present here:

a. Debtor has only one asset of any significance.

Despite the fact that the Debtor has been under the control of a Chapter 128 Receiver for the past year, and despite the creditors’ attempts to discover the identity and location of the Debtor’s assets, this Court is left to start this action with very little information. However, even the small amount of information given by this Debtor to the Court is inaccurate.

In the Debtor’s Petition, it alleges to owns assets valued at less than \$50,000. (Doc. 1). This can only be the value of the *personal property assets* that the Debtor alleges that it now owns, and could not conceivably include the value of the large commercial real estate parcel pledged to Ability. The Court should question why Ability saw fit not to include the value of its most valuable asset on its Petition.

The Debtor’s Petition is also woefully inconsistent with the asset list it produced in the Chapter 128 Receivership Action. There, the Debtor listed ownership in equipment with a total replacement or appraised value of over \$20,000,000.00 – an amount 4,000x greater than the assets it now allegedly owns. (McKinnon Aff. Exh. H, Exh. 1).

Assuming that the \$50,000 valuation is limited to personal property assets, those assets constitute less than 1% of the value of the assets of the Debtor when considering the Real Estate, meaning that the Real Estate is the only significant asset of the Debtor.

b. Debtor has no employees.

As of February 17, 2016, the Debtor had no employees. The Debtor admitted that the employees who did work for the Debtor at one time were sent to work for various other entities owned and/or operated by Ronald Van Den Heuvel. (McKinnon Aff. Exh. H, 11:2- 24:18). The Receiver’s property manager, Silverman Consulting, confirms that the Debtor moved its employees to Patriot Tissue on the date of the Order Appointing Receiver. (McKinnon Aff. Exh. B).

- c. Debtor is unable to meet current expenses.

The Debtor has failed to make any payment to Ability in almost two years. Upon information and belief, the Debtor has also failed to make regular payment to those creditors who initiated the Chapter 128 Receivership Action, including Dr. Marco Araujo, Clifton Equities, Inc. and Wisconsin Economic Development Corporation. The Debtor has also failed to pay real estate taxes for three years.

- d. The Debtor's assets are subject to pending receivership action as result of arrearage on indebtedness.

The Receivership Action has been pending since May 20, 2015. Unfortunately, that action moved at glacier speed due to the Debtor's refusal to cooperate.

- e. Timing of debtor's filing evidences attempt to delay or frustrate legitimate efforts of secured creditors to enforce their rights under the Receivership Action.

The timing of this Action is suspect, filed just one week after the Brown County Circuit Court judge entered a Writ of Body Attachment to compel the Debtor to provide its creditors with information regarding its assets and income. On the most fundamental level, creditors must be entitled to obtain information regarding the Debtor and its assets. The Debtor had obviously exhausted all avenues of delay in the State court, and now seeks an additional (and undeserved) reprieve from its creditors through this bankruptcy action.

- f. The Debtor lacks any reasonable probability of an effective reorganization.

"The clearest case of bad faith is where the debtor enters Chapter 11 knowing that there is no chance to reorganize his business and hoping merely to save off the day when the creditors take control of his property." In re James Wilson Associates, 965 F.2d 160 (7th Cir. 1992). In this case, there is no operation to reorganize. The Debtor has no employees with which to operate. The Debtor owns one significant asset, which it has allowed a related company to use for free during *at least* the past six months. All the while, the Debtor has purposefully evaded all direction from the Brown County Court, and has consistently stonewalled the efforts of the Receiver and creditors to discover the Debtor's assets. This evidence suggests that the Debtor has no purposeful business operations to reorganize in the first instance.

20. Given the unique history and facts of this case, this Court should find that cause exists to lift the automatic stay as it pertains to the Real Estate and allow Ability to commence with a foreclosure action.

C. MOTION TO PROVIDE ADEQUATE PROTECTION

21. In the event that the Court does not grant Ability's Motion for Relief from Stay, Ability requests that the Court order the Debtor to commence adequate protection payments in the following amounts:

- A. The sum of \$48,405.50 per month monthly, representing interest only payments based on a 6% rate of interest; and
- B. The sum of \$8,500.00 per month, representing a tax escrow based on 1/12th of the 2015 tax bill; and
- C. Proof of hazard insurance identifying Ability as Mortgagee.

22. Ability further requests that, to the extent not already disclosed to this Court, the Debtor be required to identify the sources of income from which the adequate protection payments will be made and an accounting of the rental proceeds.

D. MOTION TO DECLARE DEBTOR A SINGLE ASSET REAL ESTATE ENTITY

23. In the event that the Court does not grant Ability's Motion for Relief from Stay, Ability further requests that the Court declare that Debtor is subject to the single asset real estate provisions of the Section 362(d)(3) of the Bankruptcy Code.

Dated this 4th day of May, 2016.

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